No. 81-2116

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner refused to rehire its five keypunch operators after they briefly quit because, shortly before they quit, they had engaged in a protected protest concerning their wages and working conditions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not reported. The decision and order of the National Labor Relations Board are reported at 255 N.L.R.B. No. 151 (Pet. App. B1-B2).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982 (Pet. App. A4). The court of appeals denied a timely petition for rehearing on April 13, 1982 (Pet. App. C1). The petition for a writ of certiorari was filed on May 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (Pet. App. E1-E2).

STATEMENT

1. Petitioner is a manufacturer of heavy industrial equipment (Pet. App. B4). On April 5, 1979, petitioner's five keypunch operators complained to Operations Manager Mike Lanphier about their wages and working conditions, particularly about a requirement that they do an extra work assignment without additional pay (*id.* at B4-B5). Lanphier informed them that the company management was very angry about their request for a raise, that their complaint would be held against them when their annual merit raise review took place, and that he could have the whole keypunch department replaced (*id.* at B5-B6). In protest of Lanphier's position, the five employees decided to call in sick on the following Monday and Tuesday, April 9 and 10, 1979 (*id.* at B6). After discussing their grievances with Lanphier and Information Systems Manager Tom Nast on their return to work on Wednesday, April 11, the keypunch operators, acting as a group, quit because of their dissatisfaction with their working conditions (*id.* at B7).

On Monday, April 16, the keypunch operators telephoned Division Controller Craig and requested that they be rehired. Craig responded that the keypunch operators could not be rehired. (Pet. App. B8.) Thereafter, on April 19, Corporate Vice-President Cavendar denied Keypunch Supervisor Elam's request that the keypunch operators be rehired,[1] asserting that, because the operators walked out, he was precluded by company policy from rehiring them (*ibid.*).

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[1] As a result of the keypunch operators' decision to quit, the keypunch department had to borrow employees from other departments and to operate almost 16 hours a day (Pet. App. B11; Tr. 219-220). During the April 9 and 10 sick-out, employees also had to be borrowed from other departments to keep the keypunch department operating (Tr. 170, 196-197, 206-207). "Tr." references are to the transcript of the hearing before the Administrative Law Judge.

2. The Board, adopting the decision of the Administrative Law Judge, found that petitioner, in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), threatened to deny the keypunch operators raises and to have them replaced because they had engaged in a protest protected by the Act (Pet. App. B1, B6). The Board found that petitioner further violated Section 8(a)(1) by refusing to rehire the keypunch operators because they had engaged in a protected protest (Pet. App. B1, B10-B12). In so ruling, the Board expressly found that Operations Manager Lanphier, Keypunch Supervisor Elam, Information Systems Manager Nast, Division Controller Craig, and Corporate Vice-President Cavendar had "knowledge" of the keypunch operators' protected protest (Pet. App. B12). The Board rejected as a "transparent pretext" petitioner's assertion that company policy prohibited company officials from rehiring employees who had quit without giving notice (*id.* at B1, B12). As the Law Judge explained, the alleged policy was (*id.* at B10-B11):

> * * * never reduced to writing, not communicated to keypunch operator supervisor Elam, and [one] as to which only two examples—inapposite to the present case, out of 1,200 employees in 36 years were given. The flimsiness in the proof of such policy is further shown by the vagueness in details about how the policy works and what constitutes notice, as well as the fact that its prior enforcement is put in serious question by the fact that one of the keypunch operators was rehired the year before the incidents in this case arose though she had given only a few days' notice, while on vacation, that she would not be returning to work the following week.

3. The court of appeals, by unpublished order, upheld the Board's decision. In affirming the Board's finding that petitioner had knowledge of the keypunch operators'

protected protest, the court, while acknowledging that there was "no direct evidence" that Division Controller Craig and Corporate Vice-President Cavendar had such knowledge, noted (1) that "Craig and Cavendar ranked above [Operations Manager] Lanphier in the line of managerial supervision, and Lanphier testified that he relayed [the keypunch operators'] requests to 'management' and that 'management' was upset"; (2) that "[n]either Craig nor Cavendar testified that he was unaware of the [keypunch operators'] activities * * *"; and (3) that "[i]t could reasonably be inferred that Craig and Cavendar would have known of the [keypunch operators'] sick-out because it apparently caused serious disruption of operations and required the borrowing of employees from other departments" (Pet. App. A2). In affirming the Board's finding that the reason advanced by petitioner for the refusal to rehire the keypunch operators was a "transparent pretext," the court noted (1) that "the [purported] policy had never been put in writing or communicated to employees"; (2) that "even [Keypunch Supervisor] Elam was unaware of [the purported policy]"; and (3) that "[petitioners'] witnesses were unable to furnish any testimony as to the purported policy's age, origin, or precise working details" (Pet. App. A2-A3).

ARGUMENT

1. The first question raised in the petition (Pet. 5-9)—whether the Board's decision in *Wright Line* v. *Lamoureux*, 251 N.L.R.B. 1083 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982),[2]

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[2]In *Wright Line* the Board adopted the mode of analysis set forth in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), to determine whether an employee was discharged for protected union activity in violation of the National Labor Relations Act. Thus, once the Board's general counsel has established that opposition to the employee's protected activities was a "motivating factor" in the employer's discharge decision, the employer will nevertheless prevail if it can show that it would have taken the same action "even in the absence of the protected conduct." *Wright Line*, *supra*, 251 N.L.R.B. at 1089.

improperly shifts the burden of proof to the employer in a discriminatory discharge case—is not properly presented here. As petitioner acknowledges (Pet. App. 5 n.7), it did not raise this issue before either the Board or the court of appeals. Accordingly, the issue is not properly before this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[3]

In any event, even if petitioner's *Wright Line* contention were properly before this Court, it would not warrant review. Petitioner's contention rests essentially on the fact that, although every circuit that has considered the Board's *Wright Line* test has given it general approval,[4] the First and Third Circuits have held that the test improperly shifts

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[3]The cases cited by petitioner (Pet. 5 n.7) where this Court has considered contentions that were not raised before the court of appeals involved either a situation where consideration of the contention that was not raised before the court of appeals was necessary to consideration of a contention that was raised (*e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)), or a situation where the contention that was not raised before the court of appeals could not have been raised because the decisional authority underlying the contention had not yet been announced (*e.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)). Neither situation is involved in the present case. The Board's decision in *Wright Line* v. *Lamoureux*, 251 N.L.R.B. 1083, was issued in August 1980; the First Circuit's decision in *NLRB* v. *Wright Line*, 662 F. 2d 899, and the Fifth Circuit's decision in *TRW, Inc.* v. *NLRB*, 654 F. 2d 307—which represent two of the three circuit court decisions underlying petitioner's *Wright Line* contention—were both issued in September 1981. The court of appeals did not decide the present case until March 15, 1982, and it denied the petition for rehearing en banc on April 13, 1982.

[4]See *NLRB* v. *Robin American Corp.*, 654 F. 2d 1022, 1025 (5th Cir. 1981); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F. 2d 442, 446 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F. 2d 460, 461 (7th Cir. 1981); *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 (8th Cir. 1982); *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909 (9th Cir. 1981); *Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F. 2d 626 (5th Cir. 1981), cert. denied, No. 81-1605 (May 24, 1982).

the burden of proof from the general counsel to the employer because the burden that it imposes on the employer once the general counsel has made a prima facie showing of unlawful motivation is actually a "burden of persuasion" and not merely a "burden of production." *NLRB* v. *Wright Line, supra*, 662 F. 2d at 904; *NLRB* v. *Transportation Management Corp.*, 674 F. 2d 130, 131 (1st Cir. 1982); *Behring International, Inc.* v. *NLRB*, 675 F. 2d 83, 89-90 (3d Cir. 1982). See also *TRW, Inc.* v. *NLRB*, 654 F. 2d 307, 312 (5th Cir. 1981). But see *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 n.4 (8th Cir. 1982).

Petitioner's contention, however, ignores the fact that the First and Third Circuits' criticisms of the *Wright Line* test are applicable only to "dual motive" cases and not to "pretext" cases. As the First Circuit itself has indicated, the problem of "the precise allocation of the burden of proof" arises only "in 'mixed motive' cases where both anti-union animus and legitimate business reasons exist" for the employer's action, and " 'niceties of burdens of proof' " do not govern cases where " 'the employer's allegedly legitimate reason for the [action] was a pretext.' " *NLRB* v. *Steinerfilm, Inc.*, 669 F. 2d 845, 850 (1st Cir. 1982) (citation omitted). Accord, *NLRB* v. *Magnesium Casting Co.*, 668 F. 2d 13, 16 (1st Cir. 1981). Since both the Board and the court of appeals found that the allegedly legitimate reason advanced by petitioner in the present case was a "transparent pretext," the First and the Third Circuits' criticisms of the *Wright Line* test are not applicable to this case.[5]

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[5]For similar reasons, *Connick* v. *Myers*, cert. granted, No. 81-1251 (Mar. 8, 1982), another "dual motive" case cited by petitioner (Pet. 8-9), is inapposite.

2. Petitioner also contends (Pet. 10-15) that the Board's finding that petitioner refused to rehire the keypunch operators because of their protected protest is not supported by substantial evidence on the record as a whole. Petitioner's contention, however, raises purely evidentiary issues and thus does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the court of appeals correctly concluded that—in view of (1) petitioner's knowledge of the keypunch operators' protected protest, (2) petitioner's unlawful threats to deny the keypunch operators raises and to have them replaced because of their protected protest, and (3) petitioner's transparently pretextual explanation for refusing to rehire the keypunch operators—substantial evidence supports the Board's finding that petitioner refused to rehire the keypunch operators because of their protected protest.[6]

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[6]In *NLRB* v. *Pfizer, Inc.*, 629 F. 2d 1272, 1275 (7th Cir. 1980), relied on by petitioner (Pet. 13-15), the court of appeals rejected the Board's finding that the refusal to hire was unlawful because, unlike here, the general counsel introduced no evidence that any employer official was meaningfully aware of the protected employee conduct, and the employer introduced affirmative evidence that the decision-making official was not aware of the protected employee conduct. That the court of appeals did not reach the same result here reflects purely factual differences between the two cases, and does not, as petitioner contends, create an intracircuit conflict. In any event, an intracircuit conflict does not provide a basis for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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